No. 2436

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

TIMOTHY HEALY,
*Appellant,*

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco, for the United States Government,
*Appellee.*

## APPELLANT'S PETITION FOR A REHEARING.


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*Filed this.....day of April, 1915.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*


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## APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

The appellant herein, for and on behalf of the twenty-two immigrants whose names are set forth in the petitions for writs of *habeas corpus* in this matter respectfully petitions this Honorable Court for a rehearing upon the issues determined in favor of the appellee and against the appellant by the opinion of this Court filed on the 18th day of March, 1915.

A brief restatement of the facts may aid the Court in the consideration of the arguments advanced in this petition for rehearing. The cause is founded upon petitions for writs of *habeas corpus,* the petitioners being high caste Aryan immigrants from India, members of the Caucasian race and subjects of Great Britain. They entered the United States by way of the Philippine Islands, in 1913, after examination and inspection by the immigration officials at Manila, and were granted certificates of admission pursuant to the rules of the Department of Immigration then in force. At the time of the arrival of the immigrants at the Philippine Islands there was in force and effect a rule of the Immigration Department enacted pursuant to the powers vested in and conferred upon that body by Congress providing that aliens admitted to the Philippine Islands would be entitled to admission to the mainland upon application, upon presentation of the certificate given to them by the officers at Manila, without further inspection or examination. After remaining in the Philippine Islands for a time, the immigrants departed for San Francisco. Subsequent to the arrival of the immigrants in the Philippine Islands but prior to their departure for San Francisco the rule of the immigration officials previously referred to was superseded by a rule which provided that immigrants arriving on the mainland from the Philippine Islands should be re-inspected and re-examined, and if found to belong to any of the classes excluded by the Acts of Congress govern-

ing the admission of immigrants, should be arrested and deported.

Upon the arrival of the immigrants at San Francisco they were arrested by the immigration officials at that place pursuant to the last mentioned rule, upon a warrant of arrest issued by the Commissioner of Immigration. Thereafter writs of *habeas corpus* were petitioned for by the immigrants, and the petitions were denied by the Court below. An appeal was taken to this Court, and the decision of the lower Court has been affirmed.

A careful consideration of the opinion rendered by this Court has led us to the belief that the Court has not been sufficiently impressed with the gravity of the situation and the seriousness of the international issue which may be precipitated if the opinion as rendered is permitted to stand and the immigrants are deported pursuant thereto.

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**THE ORDER OF DEPORTATION IS VIOLATIVE OF EXISTING TREATIES BETWEEN THE UNITED STATES AND GREAT BRITAIN.**

The immigrants which the Government is seeking to deport, as stated in the opinion of this Court, are subjects of Great Britain. As such subjects, they are, under and by virtue of the existing treaties between the United States and Great Britain, entitled to all rights, privileges and immunities within the territory of the United States of subjects of the most favored nation.

Within the rights, privileges and immunities thus guaranteed to them are included all rights, privileges and immunities which are accorded to immigrants from the most favored nation seeking admission to the United States. There are by such treaties assured to these immigrants absolute immunity from discrimination of any nature whatsoever on account of race, color or religion.

The immigrants have been ordered deported because the immigration officials have found that they are likely to become public charges, but there can be no reasonable doubt, and the opinion of the Court below expressly finds that

> "The finding that they were persons likely to become a public charge is based in reality, however much the immigration officers may disclaim the fact, upon the general showing and implied finding that there is a prejudice against the Hindoo."

The proof upon which the order of deportation is based consists of affidavits procured by the Government in different parts of California, tending to show that immigrants from India are obnoxious and that there exists a prejudice against them. But it is not to be denied and the Court below also expressly finds, that this showing was not made as against any particular immigrant now seeking admission, but against immigrants from India generally as a race. The true reason for the arrest and deportation of the immigrants is found set forth in the application for the warrant of arrest as follows:

> "The immigrants are likely to become public charges for the reason that they are of the laboring class; that there is no demand for such labor and there exists a strong prejudice against them in this locality."

But upon the hearing before the officials there were presented three affidavits subscribed by responsible parties wherein it was alleged that there was work for immigrants from India in California and that they stood ready and willing to employ, and were desirous of securing the services of, the identical immigrants which the Government subsequently ordered deported. It is obvious that there was no foundation for the statement in the warrant of arrest that the immigrants were likely to become public charges and that there was no demand for their labor. There is left, therefore, but the third reason set forth in the warrant of arrest, and which the Court below found to be the real reason for the order of deportation,—"that there exists a strong prejudice against them in this locality".

It is a dangerously novel doctrine which the Court below, and this Court, seek to read into the immigration laws of this country, in the light of conditions now prevailing in all parts of the world,—that an immigrant seeking admission to the United States may be arrested and deported to the land from whence he came for the sole reason, not that there is any particular objection to such immigrant personally but for the reason that he belongs to a race or is a subject of a nation against which there may

exist a prejudice in the particular locality in which he may chance to apply for admission.

The gravity of the situation has been succinctly stated by the learned judge of the Court below:

> "Let there be no delusion that this power, once conceded, can be used only in the case of Hindoos. It is equally applicable to every other race. Conceding the power to the Department of Labor to exclude the Hindoo laborer for this reason, we must concede to it the power to exclude, for the same reason, the laborer of any other race. It is a vast power, and one which, upon the argument of this case, I was very unwilling to believe was lodged in any executive department of the Government."

If the opinion of this Court is permitted to stand, then does it become a precedent for the deportation of an Englishman at the port of New York, for the reason, forsooth, that some Englishman has committed an offense in New York which has created a local prejudice against his nation; or for the deportation of a German at the port of New Orleans for the reason, perchance, that commercial interests in New Orleans have suffered by reason of the depredations of German air craft and a strong local feeling has been created against that nation.

We have always understood that the Acts of Congress respecting immigration, and the rules of the immigration officials promulgated pursuant thereto were of universal application. We have never understood that their enforcement was dependent upon either the whim or caprice of any particular

immigration official, or upon the feelings, passions or prejudices of any particular section of the United States.

The object to be attained by the most favored nation clause in treaties is to place all nations upon an equality (Devlin on the Treaty Power, Sec. 131). It is respectfully submitted that in none of the departments of the Federal Government is it to be more desired that strictly indiscriminating laws and rules be enforced than in the Department of Immigration, controlling as it does the entry into the United States of the peoples of all nations.

The immigrants now before this Honorable Court, if its opinion is permitted to stand, will be deported, not because of any objection to their personal qualifications, but because members of the race to which they belong have had the misfortune to incur the ill-will and prejudice of the persons whose affidavits form the basis for the order of deportation. During the existence of the Department of Immigration such discrimination has never before been attempted against immigrants of any other nation and we respectfully submit that the ruling of the Department, affirmed by this Court, if enforced, will constitute a denial to these immigrants of the rights, privileges and immunities accorded to the subjects of other nations applying for admission to the United States.

THE IMMIGRANTS SOUGHT TO BE DEPORTED ARE ENTITLED TO CITIZENSHIP IN THE UNITED STATES.

The immigrants which the Department of Immigration seeks to deport have come to the United States with the intent to become citizens thereof. It is to be regretted that at the time of the hearing before the Department it was not deemed advisable by counsel then in charge of the matter to place before that body evidence of the right and of the intent of the immigrants now before the Court to apply for citizenship. We take the liberty at this time of placing this phase of the matter before the Court, and we respectfully request that permission be granted to lay before the Court such evidence by affidavit of the immigrants or otherwise as this Honorable Court may deem requisite to substantiate our contention.

The natives of India are divided into two classes, —those of the northern part being high caste Hindoos of pure blood and those of the southern part being what is generally termed of low caste and impure or mixed blood. The high caste Hindoos are of Brahmin faith and trace their ancestry back to the Persians and Medes of eastern Asia. These latter are members of the Aryan race, or Caucasians.

The immigrants in the present case are high caste Hindoos. It has never been doubted that the tribe to which they belong is of pure blood. That such immigrants are entitled to citizenship has been frequently decided by the Federal Courts and the question is no longer an open one. In In re Akhay

Kumar Mozumdar, 207 Fed. 115, Judge Rudkin in admitting to citizenship a native of India said:

> "Whatever the original intent may have been, it is now settled by the great weight of authority that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only. * * * It is likewise true that certain of the natives of India belong to that race, although the line of demarcation between the different castes and classes may be dim and difficult of ascertainment."

A similar question arose in the United States District Court for the Northern District of California in the matter of the petition of Taraknath Jogendranath Das, a native of India, to be admitted to citizenship. In an opinion rendered by Judge Dooling (unreported) on July 5th, 1914, admitting the applicant to citizenship, the Court, citing In re Mosumdar, supra, and U. S. v. Balsara, 180 Fed. 694, said:

> "It is difficult to determine the exact peoples intended to be embraced in the words free white persons but the trend of modern decisions is in accord with the cases cited above."

The matter therefore resolves itself into this: that not only have the immigrants been discriminated against as between themselves and subjects of other nations seeking to enter the United States, and seeking to acquire citizenship therein, but there is discrimination between these immigrants as subjects of Great Britain, in India, and other subjects of Great Britain seeking to become citizens of the United

States, and migrating from parts of Great Britain other than India.

We respectfully urge that Congress never intended that immigrants entitled to the right and privilege of citizenship in this country should be barred of that right and deported upon a showing such as has been made by the immigration officials in this case. It is submitted that so long as there is extended to the subjects of nations of the white race without discrimination, the privilege of citizenship in the United States and that privilege is not contingent upon absence of prejudice against the class of which the applicant may be a member, then is it beyond the power of the Department of Immigration to deny to the immigrants in the present case the right of residing in the United States for the requisite period for the purpose of acquiring citizenship. If the United States as a nation deems the natives of India to be objectionable as citizens then it is for Congress to so signify and no department of the Government can usurp the function and duty of that body.

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**HAVING SUBJECTED THE IMMIGRANTS TO INSPECTION AND EXAMINATION, AND PERMITTED THEM TO ENTER THE UNITED STATES AT THE PORT OF MANILA, IT WAS BEYOND THE POWER OF THE DEPARTMENT OF IMMIGRATION TO SUBJECT THEM TO AN ADDITIONAL INSPECTION AND EXAMINATION AT THE PORT OF SAN FRANCISCO.**

The method of procedure adopted by the immigration officials in this case has, so far as our research

reveals, never before been attempted. We have this situation: Prior to and at the time these immigrants left their native land, it was the law of this country that any immigrant seeking to come to the continent from the Philippine Islands might be permitted to do so upon presentation of a certificate given to him by the officials at Manila after examination and inspection or upon his arrival at that place. There was no requirement for additional examination at any other place to which he might wish subsequently to go for the purpose of obtaining work or for any other purpose. Indeed, up to that time no attempt had ever been made by the immigration officials to subject immigrants to more than one examination upon coming into the United States or into any of its possessions. These immigrants came to the Philippines, therefore, and were admitted to those islands with the implied consent of the Government that should they seek their fortunes in any other section of the United States, the certificate of admission granted to them at Manila would be sufficient evidence that they were properly entitled so to do. Presumably, conditions of labor in the Philippines were not to their advantage. At any rate, they departed from Manila for San Francisco with the intent of engaging in agricultural pursuits in California. But they found upon arrival at San Francisco that their examinations at Manila and the certificates of admission granted by the officials at that place availed them nothing. The regulations

in effect at the time of their entry into the Philippines had been revoked and in their place there had been enacted a rule which compelled them to again submit to examination, and subjected them to deportation if, in the opinion of the immigration officials at San Francisco, they fell within any of the prohibited classes.

If, in the enactment of such rules, the immigration officials are acting within the scope of their official duties as prescribed by Congress then indeed has there been delivered into their hands a vast power—the exercise of an authority the far-reaching injurious effects of which upon the labor conditions of this country it would be impossible to estimate. If such a rule be enforcible, then every immigrant laborer is virtually condemned to remain at the port of his original entry, and the opinion of the Department of Immigration is substituted for his own opinion with respect to the particular section of the country in which he may choose to labor and in which he may think his opportunities for success are greater. For, under the rule of the Department, which has been upheld by the opinion of this Court, every immigrant who moves to another section of the United States from the place of entry in the hope and expectation of improving his condition, becomes liable to arrest and deportation by the officials at the place to which he may remove upon the sole ground that, in their opinion, labor conditions are such that

he may not at such place readily obtain employment; or on the ground that in that particular locality there may be a prejudice against the particular nation of which by chance he happens to be a subject. No better scheme for regulating the supply of and demand for labor in the United States can well be imagined, and it is this vast power which, according to the opinion of this Court, has been lodged by Congress in the hands of the immigration officials of the United States.

We respectfully submit that it is neither the intent nor the spirit of the laws on the subject of immigration that an immigrant should be unceasingly harassed, and subjected and made liable to arrest and deportation, at any time after his admission in the United States, at the option of the immigration officials of the Government. It is our contention that the immigrants in this case, having submitted themselves to examination at the hands of the officials at Manila, and having been permitted to enter the territorial possessions of the United States, were no longer subject to arrest and deportation by the officials at San Francisco. We take the position that the finding of the officials at Manila that these immigrants were not likely to become public charges was not restricted to the Philippine Islands but entitled the immigrants to pursue their vocations in any section of the United States in which their services might be most advantageously utilized.

THERE IS NOTHING IN THE RECORD TO SHOW THAT THE IMMIGRANTS WERE LIKELY TO BECOME PUBLIC CHARGES.

We do not dispute the well settled rule that if there is any evidence to sustain a finding of an immigration official, it will not be disturbed by the Courts. But, giving to that rule the widest latitude of which it is susceptible, nevertheless, we respectfully submit that the present case is devoid of testimony tending even remotely to establish the fact that these immigrants were likely to become public charges.

It is not denied by the Government that each of the immigrants had in his possession at least fifty dollars. In view of the fact that members of this race are of extremely frugal habits, such a sum alone would have sufficed for their needs for a considerable period of time. But in addition there were filed with the officials affidavits of responsible persons wherein there was offered present employment at good wages for each of the immigrants which the Government subsequently ordered deported. We respectfully direct the attention of the Court to these affidavits which we have annexed as appendices to this petition for re-hearing. On the other hand, the Government rests its claim that these particular immigrants are likely to become public charges upon general affidavits and statements secured in different parts of the state to the effect that there is strong prejudice against members of this race in those particular sections of California. We do not think that the immigrants now seeking admission should

be compelled to shoulder the burden of local prejudices which have sprung up in certain sections of California against the race to which they belong.

In the case of the United States v. Williams, 189 Fed. 915, the immigration officials sought to deport a husband and wife on the ground that they were likely to become public charges. It appeared that they had in their possession a small amount of cash ($39.00) and several articles of jewelry. It also appeared that each of them had been offered employment at remunerative wages. In holding that there was no evidence before the officials upon which to base a finding that they were likely to become public charges and ordering their release from detention the Court said:

> "Undoubtedly under the authorities, if there is any evidence in a case proving or tending to prove that an alien is within one of the excluded classes, the decision of the immigration authorities is conclusive, even if there is very weighty evidence to the contrary, and the courts have no jurisdiction to interfere. But if there is no evidence that an alien is within any of the excluded classes the immigration authorities have no power to exclude him, and the order excluding him is a nullity.
>
> "In my opinion there is no evidence in this case that either of these aliens is within any of the excluded classes."

If stronger proof were needed that the finding of the Department that these immigrants were likely to become public charges was absolutely without foundation, it may be found in the fact that in the

month of August, 1913, after the arrival of the immigrants at San Francisco and their arrest by the officials, they were released on bail; that they secured employment immediately upon their release, and that since that time and up to and including the present time they have been continuously employed in various agricultural pursuits, at remunerative wages, in one of the identical sections of the State of California in which it was alleged in the affidavits procured by the immigration officials there was strong prejudice against their race and in which as therein alleged it would be impossible for them, for that reason, to procure employment.

In conclusion, we submit that the case as a whole presents a situation of gross abuse of discretion on the part of the immigration officials stationed at San Francisco. We say this not unmindful of the fact that the Courts of the United States have confirmed at the hands of such officials many orders and acts for which in our opinion it would be hard to find any justification in the Acts of Congress relating to the admission of aliens. But in the present instance we believe that the immigration authorities have gone much further than they have ever gone before and that the order in this case, and the opinion of this Court in affirmation thereof, if permitted to stand, will prove a precedent dangerous,

highly inimical to the welfare of those seeking to immigrate to the United States.

Dated, San Francisco,
April 19, 1915.

Respectfully submitted,

FRED A. COPESTAKE,
*Attorney for Appellant and Petitioner.*

WILLIAM T. HAWKINS,
*Of Counsel.*

**(APPENDIX FOLLOWS.)**

# APPENDIX.

A.

State of California,
County of San Joaquin.—ss.

Sodager Singh, manager of Sodager Singh Company, being first duly sworn, deposes and says:

We are by occupation leaseholders of agricultural land in Palm Tract, County of Contra Costa, State of California. We are and have been for some time residents of the State of California and are of the Hindoo race and subjects of Great Britain. We work under our leaseholds one hundred ninety five acres of farm land in Palm Tract, County of Contra Costa, State of California. We have had long experience with Hindoos in the industry in which we are engaged, and require the assistance on a number of capable, efficient, and industrious men from time to time; and we have found the members of the Hindoo race to be capable, efficient, industrious, intelligent, peaceful and law abiding and eminently satisfactory as workmen. We are always glad of the opportunity to secure the services of such men for these reasons. There is a large demand for Hindoo labor at good wages in California at the present time, and such demand probably will continue for a long time to come. We are at present anxious and willing to employ fifteen (15) Hindoo laborers.

We are informed that there are now detained at the Immigration Station at Angel Island, about

twenty-five (25) Hindoos on the ground that there is danger that they may become public charges, and for that reason may be excluded from entry into the United States.

We are willing at the present time to employ fifteen (15) of said Hindoos in agricultural pursuits on the properties in which we are interested in Contra Costa County, California, and we know of many others who will be willing to employ that character of labor, and who will pay them good wages, and keep them in employment.

We had no previous knowledge of the arrival of the said Hindoos in this country, and knew nothing of their coming to the United States.

We further state from an intimate knowledge of commercial and labor conditions in California that at the present time there is no likelihood that any Hindoo coming to this country will become a public charge. There is ample work for Hindoos to perform at good wages for which they are well qualified and adapted.

There is no prejudice against the Hindoos in this state which interferes with their securing immediate and permanent employment at good wages.

(Signed) SODAGER SINGH CO.,
By Sodager Singh.

Subscribed and sworn to before me this 14th day of August, 1913.

(Seal) R. S. MILLER,
Notary Public in and for the County of San Joaquin, State of California.

B.

State of California,
City and County of San Francisco.—ss.

I. L. Borden, being first duly sworn, deposes and says:

I am a white male citizen of the United States, and of the State of California.

I am a member of the State Board of Agriculture of the State of California.

I reside at No. 2505 Devisadero Street, San Francisco California.

I am the president and general manager of the Victoria Farms Company, a corporation, organized and existing under the laws of the State of California, and I own ninety-five (95%) per cent of the capital stock of that company. That company is the owner of Victoria Island, a body of land in San Joaquin County, comprising about seven thousand, three hundred, thirteen and 28/100 (7,313.28) acres; That tract of land is devoted to agriculture. I am not only the president and general manager of the company which owns the land, but I am actively engaged in the superintendence of agricultural pursuits thereon.

As such general manager, I now employ about forty (40) members of the Hindoo race, and I am anxious to immediately engage at least ten (10) more as soon as I can secure them.

I understand that there are about twenty-four (24) Hindoos now detained at Angel Island on the ground that they may become public charges. I am ready to engage at least ten (10) of these men because I need help. I do not know them, and did not know they were coming to the country, but I require Hindoo help, and find it most suitable for agricultural work. The members of this race are industrious, peaceable, law abiding and there is no prejudice against them which prevents their securing employment in this state. I have never heard of one becoming a public charge, and I do not know of any reason why any member of that race should become a public charge, as there is ample employment at good wages at hand for all that are in the State of California, and many more that may come to this state.

(Signed) I. L. Borden.

Subscribed and sworn to before me this 16th day of August, 1913.

(Seal) W. H. Pyburn,

Notary Public in and for the City and County of San Francisco, State of California.

C.

State of California,
County of San Joaquin.—ss.

Carson C. Cook, being first duly sworn, deposes and says:

I am the general manager of the Rindge Land and Navigation Company, which owns 21,300 acres of farming land in the State of California. The officers of the Rindge Land and Navigation Company are representative citizens of the State of California, one of the directors being Lieutenant-Governor A. J. Wallace, others being M. K. Rindge, president, Samuel K. Rindge, vice-president, F. B. Scotton, secretary; Fred H. Rindge, assistant secretary, George I. Cochran, director, and W. J. Williams, director. The company employs and for six years past, during my experience I have employed large numbers of Hindoos.

I have found the Hindoo to be as industrious, capable and upright working man as other nationalities in similar employment, and they are satisfactory, dependable and law abiding.

Throughout six years of experience with Hindoos I have not known or heard of a single instance in which a Hindoo became a public charge in any sense of the term.

There are at the present time positions for thirty (30) Hindoos on the lands of the Rindge Land and Navigation Company. These men are assured em-

ployment at good wages and are not at all likely to become public charges.

I have no prejudice against this class of labor and many land owners are glad to have Hindoos accept positions on the farms of the State of California at good wages and for work the year around in various capacities.

(Signed) Carson C. Cook,
Affiant.

Sworn to and subscribed before me, Ada Rice Hughes, Notary Public of the State of California, in and for the County of San Joaquin, this 27th day of September, 1913.

(Seal) Ada Rice Hughes,
Notary Public in and for the City and County of San Francisco, State of California.

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## CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a rehearing is, in my judgment, well founded in point of law and the same is not interposed for delay.

Fred A. Copestake,
*Attorney for Appellant and Petitioner.*